NO. 48732-2-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

JEFFERY MELVIN COVER, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.15-1-01407-2

BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Jeffery Cover (hereafter 'Cover') was charged by information with multiple counts of Rape of a Child in the Third Degree stemming from acts he perpetrated against S.H.M. in 2006 and 2007. CP 1-4; 179. The charges were initially investigated in 2007, but because the victim's family members and Cover's family members hid S.H.M. from the authorities and prevented her from being available to testify, the original case was dismissed. CP 179. Charges were re-filed against both Cover and his co-defendant, Julie Barnett, in 2015. CP 1-4. The case went to trial in 2016. RP 1-548. Cover was born on February 22, 1975, and was 41 years old at the time of trial in February of 2016. RP 138, 425; Ex. 7.

At trial, S.H.M.[1] testified that she was born on October 8, 1991, and was 24 years old at the time of trial. RP 179. S.H.M. grew up living with her grandparents, Sandra and Mike Cover, in Washougal, Washington. RP 180-81. She lived in a mobile home park on Addy Street with them as a child. RP 180. Sandra Cover was S.H.M.'s maternal grandmother, and Mike Cover was her husband. RP 181. S.H.M.'s parents were not a routine presence in her life. RP 182.

S.H.M. knew the appellant, Cover, as a child. RP 182. She thought of him as family, explaining he was essentially her cousin. RP 182-83. Cover lived in the same mobile home park in Washougal, Washington as S.H.M. and her grandparents did. RP 183. When she was 15 years old, S.H.M. noticed that Cover's feelings towards her had changed. RP 184. One evening he came in drunk when S.H.M. was staying at his house, and he laid next to S.H.M. on the couch and started touching her on her body, including her breasts. RP 184-85. Cover then took S.H.M. to his bedroom and had sexual intercourse with her. RP 186. Cover put his mouth on S.H.M.'s vagina, and then put his penis inside her vagina. RP 186.

This type of sexual contact and sexual intercourse occurred again, so frequently it became a sort of habit. Cover would come over to S.H.M.'s house and ask her grandparents if she could babysit for his

[1] Though the victim was an adult by the time of trial, the State identifies her throughout its briefing as S.H.M. or "the victim" to give her as much privacy as possible.

girlfriend's, Julie Barnett's, children, usually early mornings when Ms. Barnett was working. RP 187. Sometimes Cover would then take S.H.M. to his own house, other times to his girlfriend's house. RP 188.

On another particular occasion, S.H.M. was at Ms. Barnett's house hanging out with her children, and in the evening, they were drinking beer, and Cover asked Ms. Barnett if they could all "fool around." RP 189. Cover and Ms. Barnett took S.H.M. into their bedroom where a pornographic movie was on the TV. RP 189. Ms. Barnett raped S.H.M. by placing her mouth on S.H.M.'s vagina, and then Ms. Barnett and Cover engaged in sexual intercourse in S.H.M.'s presence, and then Cover raped S.H.M. by putting his penis in her vagina, and again by putting his penis in her anus. RP 190-91. During this incident, S.H.M. was in pain and told Cover and Ms. Barnett that it hurt, and Cover and Ms. Barnett would argue between themselves over which one was hurting her. RP 190. Ms. Barnett used her fingers to penetrate S.H.M.'s vagina and "bottom area." RP 190.

On another occasion after the time when both Ms. Barnett and Cover raped S.H.M., Cover again raped S.H.M. at his house by placing his penis in her vagina. RP 191-92. On yet another occasion, Cover put his mouth on S.H.M.'s vagina at the same time she put her mouth on Cover's penis. RP 192. Cover later told S.H.M. that this was called "69." RP 192.

Overall, S.H.M. believes Cover raped her 10 to 20 times before it was reported to the police. RP 193.

All of the occasions of rape occurred in Clark County, Washington, at a time when S.H.M. was not married or in a state registered domestic partnership. RP 194. All the occasions of rape occurred when S.H.M. was either 14 or 15 years old. RP 194. None of the above-described events occurred after S.H.M. turned 16. RP 194-95.

As the abuse was on-going, S.H.M. told her Aunt Megan Cover[2] what was happening. RP 195. Megan lived in the same mobile park as Cover and S.H.M. and her grandparents. RP 195, 272. Megan was married to Mike Cover, Jr. whose father was S.H.M.'s grandmother's husband, Mike Cover, Sr. RP 181, 271. Cover and Megan's husband were cousins, and were close growing up together. RP 272. At an Easter party in 2007, S.H.M. asked her Aunt Megan whether she knew if Julie Barnett, Cover's girlfriend, had an STD. RP 274. A few days later, Megan and S.H.M. were out on a walk and Megan asked her why S.H.M. was wondering if Julie had an STD. RP 274. Megan asked S.H.M. what was going on and if S.H.M. was ok, and S.H.M. broke down and told her. RP 196. S.H.M. described a sexual encounter between herself and Cover, and between

[2] Because so many witnesses share the same last name, the State refers to Megan Cover by her first name throughout its briefing. The State intends no disrespect by doing so, and does so only for clarity.

herself, Julie, and Cover. RP 275. S.H.M. was crying during this conversation. RP 275. Megan contacted the police immediately, that same day, as she was a mandatory reporter. RP 196, 275. Megan remained at the house with S.H.M. while she spoke to police and Megan saw her crying during the entire contact. RP 276.

S.H.M.'s grandmother, Sandra Cover, was upset that S.H.M. told Megan first and that the police were contacted; Mrs. Cover did not want the police involved. RP 196, 276. Sandra Cover cut off her relationship with Megan after this was reported to police. RP 276. Megan and her husband were both entirely cut off from the family after this was reported. RP 276-77. After S.H.M. spoke with police, she had a medical examination, and charges were filed. RP 196-97.

S.H.M.'s medical examination was conducted by Deborah Munson, a pediatric nurse practitioner, on May 11, 2007. RP 406, 410. During her examination, S.H.M. told Ms. Munson that she had had sexual intercourse with Cover, including vaginal, oral, and anal intercourse. RP 412. S.H.M.'s genital exam showed normal findings, though a normal finding cannot confirm or deny that sexual intercourse occurred. RP 416.

Soon after police became involved, S.H.M. was present when Cover's father came up from California and discussed with S.H.M.'s grandparents and Cover what they should do. RP 197. They decided they

should have S.H.M. marry Cover so that sexual intercourse would be legal and Cover wouldn't get in trouble. RP 197. Cover participated in this conversation, and it was decided that they would go to Mississippi to get married. RP 198. They decided on Mississippi because they could legally get married when S.H.M. was 15 years old and Cover was older. RP 198.

So when S.H.M. was 15 years old and Cover was 32 years old, they were legally married in the State of Mississippi. RP 198. Exhibit 6 admitted at trial is a copy of the marriage certificate from the State of Mississippi between Cover and S.H.M. RP 423-24; Ex. 6. They were married on July 9, 2007. RP 424; Ex. 6. S.H.M.'s grandparents and Cover's father accompanied S.H.M. and Cover to Mississippi. RP 198. S.H.M. didn't know what to think about these events; she was pulled out of school prior to completing the ninth grade, and she had wanted to continue school. RP 199. S.H.M. never re-enrolled in school. RP 199. After the marriage ceremony, Cover's father drove her with him to California, and S.H.M. "hid out" at Cover's father's house because "everyone was looking for" S.H.M. RP 199. Once the State dismissed the case and "dropped" the charges, Cover called S.H.M. to let her know, and S.H.M. was returned to Washington. RP 199. On her 16th birthday, S.H.M. and Cover repeated a marriage ceremony, this time in the state of Idaho, to make sure they were legally married, S.H.M. believes. RP 200. Exhibit 8

admitted at trial shows Cover and S.H.M. were married in the State of Idaho on October 9, 2007. RP 424; Ex. 8. After S.H.M. and Cover were married, and the criminal case had been dismissed, S.H.M. lived with Cover for a few years, and they remained married. RP 229-31. S.H.M. did not have any other family support at this time; her grandparents were gone by then and she was not speaking with her aunt and uncle. RP 231. Cover was the only person she had. RP 231. However, Cover verbally and emotionally abused S.H.M. while they were married, called her names, and S.H.M. tried to leave him several times. RP 231. This was not a relationship S.H.M. wanted to be in. RP 234.

Cover told S.H.M. that she needed to take back what she had told police about what had happened. RP 231. S.H.M. felt pressured to take back what she said and felt like she would be in trouble with him if she did not make everything ok. RP 232. After the case was initially dismissed, S.H.M. believed that everything about the criminal case had been "dropped" and "forgotten about." RP 233. The State contacted her about the case being re-filed all these years later; she did not contact them. RP 233.

During the time period when Cover and his family were hiding S.H.M. and keeping her in California, and for quite some time after, Megan had no contact with S.H.M. RP 278. She was not able to keep

contact with S.H.M. in any way, though she, her husband, and their friends, tried to find her on Facebook and Myspace. RP 278. Megan did not know if S.H.M. was safe or alive during this time period. RP 278.

During cross-examination of S.H.M., Cover asked her about a letter that was written in S.H.M.'s handwriting that recanted the allegations of sexual intercourse prior to her marriage to Cover. RP 210. Though the letter appears to be written in her handwriting, S.H.M. had no knowledge or memory of writing the letter, and she did not know why she would have written the letter. RP 210, 228. Nothing written in the letter was true; its contents were "ridiculous." RP 232. What S.H.M. told her Aunt Megan, Sergeant Chicks and Officer Yamashita in 2007 about what happened with Cover was the truth. RP 233-34.

After Cover announced his intent to impeach S.H.M. through her statements in the recantation letter, the State announced its intent to rehabilitate S.H.M. through her prior consistent statements to her Aunt Megan and both police officers. RP 212-17. Cover initially objected to the State being able to rehabilitate S.H.M. with prior consistent statements arguing ER 801 prohibited admission of prior consistent statements unless used to rebut a claim of recent fabrication. RP 218. The State indicated it was offering these prior consistent statements under ER 613 for rehabilitation of S.H.M. Cover then agreed that the trial court could allow

the witnesses to rehabilitate the victim with her prior consistent statements under ER 613. RP 265; 296-303. The trial court then properly identified the rule under which he was considering this evidence, and indicated he had the discretion to admit the evidence, and also to limit it, and the court limited the extent of the prior consistent statements the State could elicit. RP 267-69; 299-303. Cover did not object to the prior consistent statements as being improper or inadmissible, he agreed that the statements could be admitted under ER 613, but asked the court to exercise its discretion and limit the State's ability to rehabilitate the victim, and the court granted Cover's request, significantly limiting the amount of prior consistent statements elicited through Megan and the two police officers. RP 299-303.

At the time of trial, Kim Yamashita was the Chief of Police for the City of Sandy in the State of Oregon. RP 317. Prior to that, Chief Yamashita was a police officer sergeant with the City of Washougal Police Department in Clark County, Washington. RP 317. On April 20, 2007, while working as a patrol sergeant for Washougal, Chief Yamashita was dispatched to 4501 Addy Street, a trailer park where the Cover family and S.H.M. lived in Washougal. RP 318. Upon arriving, Chief Yamashita was greeted by Megan, who was crying pretty hard. RP 318. Megan's eyes were puffy and she had make-up running down her face. RP 318-19.

Megan explained why she had called the police and introduced her to S.H.M. RP 319. S.H.M. was crying and appeared to have been doing so for quite some time. RP 319. Chief Yamashita interviewed S.H.M. during which time S.H.M. indicated she had been having sex with Cover, that one time included sex with both Cover and Julie. RP 319-20.

In June 2007, a couple months after interviewing S.H.M., Chief Yamashita was notified by Child Protective Services that S.H.M. was missing. RP 320. Chief Yamashita attempted to find S.H.M. by going to her grandparents' home several times, leaving cards on the front door, attempting contact with them. RP 320. Chief Yamashita could see signs that people were still living in the mobile home: the mail was being picked up, and there were signs people were coming and going, but no one was ever home when she visited. RP 320. In November 2008, Chief Yamashita had a conversation with S.H.M. during which she indicated that her mother came from Illinois to take S.H.M. to live with her for a period of time. RP 321.

At the time of trial, Bradley Chicks was a patrol sergeant for the City of Washougal Police Department. RP 322. In 2007, he worked as a detective sergeant for Washougal. RP 322. Sgt. Chicks also reported to 4501 Addy Street in Washougal to investigate the allegations against Cover. RP 323. He met with S.H.M., who appeared emotionally drained.

RP 324. During his conversation with her, S.H.M. disclosed to Sgt. Chicks that she had been having sex with Cover, that she had oral sex with Cover, and that there was an incident where she had sex with Cover and Julie together. RP 324. During his investigation, Sgt. Chicks searched Julie Barnett's house and found a VHS of pornography inside. RP 336. Sgt. Chicks then contacted Julie and she told him that she was involved in a sexual incident with Cover and S.H.M., that she saw Cover having sex with S.H.M., and that she (Julie) participated as well. RP 337-38.

Sgt. Chicks also interviewed Cover during his investigation. RP 338. When Sgt. Chicks first mentioned S.H.M. to Cover, his appearance changed: he became shaky and appeared nervous. RP 338. Cover initially denied having any kind of relationship with S.H.M. RP 338. Cover then asked Sgt. Chicks, "if I tell you the truth, what's in it for me – will you let me go?" RP 339. Cover then admitted to lying with S.H.M. on a couch and touching and kissing her, but denied going any further. RP 339. Sgt. Chicks took a break from his interview with Cover, and when he returned to take Cover to the jail, he asked Cover if he wanted to tell him the truth. RP 340. Sgt. Chicks told Cover he only wanted Cover to be honest and wanted to know if it was something where feelings were involved or if force was involved, and it was just important for Sgt. Chicks to know the truth for his investigation. RP 340. Cover then hung his head, his

demeanor changing, and became emotional. RP 341. Cover said he loved her and that he couldn't help it. RP 341. Cover then told Sgt. Chicks about his sexual acts with S.H.M. RP 341- 43. Cover said the last time he had sex with her was April 14, 2007, and that had occurred at Julie's house in her bedroom. RP 341-42. Cover admitted the first time he had sex with S.H.M. was in the summer of 2006, saying that he brought her back to his bedroom from where she had been on the couch and having a sexual relationship with her at that time. RP 342-43. Cover also described the incident wherein he and Julie participated in sexual acts with S.H.M. together. RP 342.

Sgt. Chicks learned that S.H.M. was missing and couldn't be located. RP 343. Sgt. Chicks and others looked for S.H.M. for "a long time," and Sgt. Chicks concentrated his efforts on looking for the grandparents, specifically in the North Bonneville area near Stevenson. RP 343. They were unsuccessful in finding S.H.M. RP 343.

Julie Barnett, Cover's girlfriend during the time period of the charges, also testified at trial. RP 135. She testified that both she and Cover lived in the mobile home park on Addy Street in Washougal during the relevant time period. RP 136. Sometime in either late February or early March 2007, Julie came home from work one night to find S.H.M. and Cover at her house, drinking and talking. RP 139. During conversation,

Cover brought up wanting to have sex with S.H.M. RP 140. This type of conversation lasted approximately two or three hours. RP 140. Cover and S.H.M. talked Julie into participating in a "threesome." RP 141. Cover told Julie if she loved him she would do this for him. RP 141. The three went to Julie's bedroom, and she saw Cover have sex with S.H.M. – specifically, Cover put S.H.M. on the bed, bent over her and started having sex with her. RP 143. Cover told S.H.M. it was okay, and said, "look, this is what she wants." RP 143. Julie kissed S.H.M. and touched her during this incident. RP 143-44.

Julie testified that she was charged for her involvement in this case, but around September 2007 her case was dismissed. RP 148. Both she and Cover had been charged as co-defendants and she understood their case was being dismissed because S.H.M. could not be found. RP 148. After appearing in court on the dismissal, Julie talked to Cover outside of the courthouse. RP 148. During this conversation, Cover told Julie he was sorry he had a relationship with S.H.M.; he told her it had been going on for a year and a half and it was a sexual relationship. RP 149. Cover told Julie that he had brought S.H.M. to Julie house numerous times while Julie had been at work. RP 149. Cover also told Julie that S.H.M.'s grandmother had had S.H.M. "removed" and that they were moving her around to keep her from being caught, and they wanted it all to go away.

RP 150. Cover told Julie he was going to have to play his part to make sure that S.H.M. was "taken care of." RP 150. Julie understood that Cover was somewhat of an active participant in keeping S.H.M. away from the area to avoid the case going forward because Cover implied that he knew her whereabouts and where she was being moved around to. RP 163. The case against Julie was re-filed, as Child Molestation in the Third Degree and Rape of a Child in the Third Degree, and the charges were pending at the time of trial. RP 152. Julie entered into a cooperation agreement with the State wherein she will plead guilty to Assault in the Third Degree, a felony, and serve 60 days – 30 in jail, and 30 on work crew, in exchange for her testimony at Cover's trial. RP 152-53, 164-65. Julie's version of the events between her sexual encounter with both Cover and S.H.M. was the same at trial as it was when she spoke to Sgt. Chicks in 2007. RP 166.

In his defense, Cover presented the testimony of Shannon Patton, his fiancée at the time of trial. RP 447. Ms. Patton testified that she was neighbors with S.H.M. and Cover in 2009 and at that time S.H.M. told her that she and Cover did not have sex until they were married. RP 447. Ms. Patton is the one who claims to have found S.H.M.'s recantation letter amongst Cover's belongings; Cover's prior attorney's business card was stapled to it. RP 449. Ms. Patton identified a Facebook message that appeared to be from her account written to S.H.M. that said, "I need you to

let this go [victim's name]" and "It's the best thing for you to do. Trust me when I'm telling you this." RP 456.

During her closing arguments, the prosecutor made the following arguments that Cover now complains of:

> So Count Three – the Defendant himself actually gives us the dates – the exact date for Count Three. And you can recall Sgt. Chicks testified that the Defendant started admitting to him what happened – admitted to him that he was in this relationship with [S.H.M.] – that he loved her – he couldn't help it and yes he's been having sex with her.
>
> He admitted the last time they had sex was Saturday, April – let me make sure I'm right – April 14th, 2007. They were having this conversation – I believe – on April 21st – just about a week later and the Defendant admits that that was the last time he had sex with her.
>
> That he picked her up early in the morning and brought her to Julie's. That's consistent with what [S.H.M.] told us. Again [S.H.M.] couldn't remember the exact dates but she said that after the threesome the Defendant took her to Julie's house to have sex multiple times – and he took her back to his house to have sex as well.
>
> She said that he would pick her up in the morning and 8 bring her over to Julie's house while Julie was at work and Julie's kids would be asleep or in their rooms. Well that's what the Defendant said happened on the 14th. He said he picked up [S.H.M.] –they went to the house and Julie's kids were asleep during that incident.
>
> And actually Julie Barnett – in a way – corroborates this as well. See Julie told us something about her work schedule and the Defendant's work schedule at this time. I want you to ask yourself why the Defendant would have done this if it weren't to facilitate the relationship with [S.H.M.].

RP 493-94. The prosecutor also argued,

> Now there is a second aggravator here and that's called – it's described for you in Jury Instruction Number 21 - an egregious lack of remorse.
>
> An egregious lack of remorse means that the Defendant's words or conduct demonstrated extreme indifference to harm resulting from the crime or were affirmatively intended to aggravate that harm.
>
> And it gives you three kind of things to look at to decide if the Defendant, Jeffery Cover showed an egregious lack of remorse. First did his conduct increase the suffering of beyond that caused by the crime? Second were they of a belittering –belittling nature with respect to the harm suffered by the victim and (c) did his ac – actions reflect an on-going indifference to such harm.
>
> So how do you ask yourself if what he did after this happened increase the suffering of the victim beyond just the sex act? Some things to keep in mind – you know – the Defendant was caught in 2007 – but that's not the end of the story. He wasn't 10 brought to trial then and there's a reason for that. He hid [S.H.M.].
>
> And she told you what was happening during that time. Let's look at what happened to [S.H.M.] after this case was dismissed. When she finally cried out for help – she talked to her Aunt Megan Cover. She talked to the police. She goes and sees that (inaudible). She finally recognizes that that isn't what she wants and that this is wrong because the Defendant is thirty-one when she's fifteen.
>
> And what does she get as a result? She's pulled out of school at the beginning of ninth grade. She testified she didn't get to finish – she finished the eighth grade – passed it – she never was able to go back.
>
> She is present in a meeting with her family and the Defendant where they all talk about how to get the

> Defendant out of trouble for this without any regard for what happened to her.
>
> She is then spirited away – away from her family – away from her friends – away from everything she knows and brought to Mississippi where the Defendant marries her. After that he hides her at his dad's house in California because the case isn't dismissed yet – keep in mind. And why does the Defendant marry her? We heard some testimony on that from [S.H.M.] – he wanted to stay out of trouble and that makes sense.
>
> I mean using your common sense it's quite clear that when he goes and marries the girl who has accused him of rape – that's what he's trying to do. He's trying to stay out of trouble because if he was married to her – under Washington law – that means it would have been okay. But he wasn't married to her at the time. So he brings her to Mississippi and he marries her then.

RP 496-98. And she continued:

> The harm to [S.H.M.] goes far above just what he did on those incidents. And the Defendant showed an egregious lack of remorse. Again that last prong of egregious lack of remorse is reflected in the on-going indifference to such harm.
>
> The Defendant took the girl who he had been by definition of law raping for almost a year and he took her from her family –from her friends – out of school and he married her. I submit to you that certainly shows an indifference to the harm that he had caused her.
>
> The Defendant took quite a few years from [S.H.M.] - by his actions before they were married – but his action that are the basis for these charges and afterwards by an egregious lack of remorse. He took years from her that she can never get back.

RP 500.

In his closing argument, Cover told the jury that "[t]his case ultimately comes down to the words of [victim]." RP 501. He then spent his entire closing discussing how the evidence did not support the victim's version of events. RP 501-20. In rebuttal, the prosecutor argued,

> But [the Judge] has never told you to disregard your common sense. You actually have a jury instruction on this as well – Jury Instruction Number 4. It says:
>
> > The evidence that has been presented to you may be either direct or circumstantial. The term "direct evidence" refers to evidence that is given by a witness who has directly perceived something at issue in this case.
>
> That would be [S.H.M.]. That would be Julie. That would be the detective. The term "circumstantial evidence" refers to evidence from which, based on your common sense and experience you may reasonably infer something that is at issue in this case.
> ...
> What does that mean? When you go back to that jury room you need your common sense. So let's look at this case through that lens. What's the direct common sense?
>
> Now for the defense's theory to be true – that this didn't happen – we would have to have two false confessions – the Defendant and the Ms. Barnett. We'll get into specifics.
>
> We would have to have two people that are saying – that are talking about these sex acts that are making these accusations– two separate times – nine years apart. We would have to have [S.H.M.] not only lying to you today but also lying back in 2007.
>
> And Julie Barnett would have to be lying today and also in 2007. We would have to have Megan being the mastermind behind this whole thing.

RP 522-23.

After deliberating, the jury returned guilty verdicts on all counts. CP 160-62. The jury also answered "yes" to each aggravating factor, finding that these offenses were part of a pattern of ongoing sexual abuse and that Cover displayed an egregious lack of remorse. CP 163-67. Prior to sentencing Cover, the trial court ordered a pre-sentence investigation. CP 169. As a result of that investigation, the DOC officer who conducted it recommended an exceptional sentence of 150 months be imposed. RP 188. The trial court sentenced Cover to an exceptional sentence above the standard range based on aggravating factors found by the jury. CP 207. Cover was sentenced to the high end of the standard range on each count, to run consecutively to each other count, for a 180 month sentence. CP 206-08. Cover then timely filed this appeal. CP 237.

ARGUMENT

I. This Court should deny Cover's Corpus Delicti claim.

Cover argues the trial court improperly admitted statements he made as there was insufficient separate evidence to prove the substance of those statements, thus violating the corpus delicti rule. Cover failed to preserve this argument at the trial court level and thus this Court should refuse to review it. Furthermore, even if this Court does reach the merits

of this claim, it should find Cover's arguments unpersuasive and deny relief.

A defendant's uncorroborated confession is insufficient to support a conviction; independent evidence showing a crime occurred must be introduced at trial in order to admit a defendant's confession. *State v. Aten*, 130 Wn.2d 640, 655, 927 P.2d 210 (1996). This rule, the corpus delicti rule, is a judicially created rule of evidence. *State v. Dodgen*, 81 Wn.App. 487, 492, 915 P.2d 531 (1996). As it is a created rule of evidence, its violation is not of constitutional magnitude and is generally not reviewable when raised for the first time on appeal. *Id.* RAP 2.5(a)(3). Requiring a defendant object to the admission of his statements on corpus delicti grounds preserves the State's ability to ensure it presents independent evidence, as well as gives the trial court a chance to correct potential error during trial. *See State v. Cardenas-Flores*, 194 Wn.App. 496, 509 n. 5, 374 P.3d 1217 (2016). Cover failed to alert the trial court to potential error while there was still time to correct the potential error, and thus has waived his right to have this issue reviewed. Cover should not be allowed to remain silent on this issue at trial, sit back and allow this claimed error to occur, and take advantage of it on appeal. This would not be in the interests of justice or judicial economy. This Court should not review

Cover's claim of erroneous admission of his confession due to a violation of the corpus delicti rule as he did not preserve the issue at trial.

Even if this Court chooses to review Cover's corpus delicti issue, his claim should be denied as there was no violation of the rule. Under the corpus delicti rule, a defendant's confession is inadmissible unless the State presents prima facie evidence showing the crime was committed. *State v. Aten*, 130 Wn.2d 640, 656, 927 P.2d 210 (1996). This other evidence does not need to prove the commission of the crime beyond a reasonable doubt, but it must be sufficient to support a logical and reasonable inference that the crime occurred. *Id.* The State must "prove every element of the crime charged by evidence independent of the defendant's statement." *State v. Dow*, 168 Wn.2d 243, 254, 227 P.3d 1278 (2008). But the State's burden is one of production of the evidence, not persuasion. In reviewing a claim of improper admission of a confession under the corpus delicti rule, this Court views the independent evidence, and all reasonable inferences from it, in the light most favorable to the State to determine if the State met its prima facie showing sufficient to establish the crime occurred. *Id.* at 658. Notably, the corpus delicti rule does not require that every element of the charged crime be established by the State with independent evidence. *State v. Burnette*, 78 Wn.App. 952, 956, 904 P.2d 776 (1995). The State only need show a specific injury or

loss, and a criminal act causing that injury or loss. *State v. Smith,* 115 Wn.2d 775, 781, 801 P.2d 975 (1990); *State v. Mason*, 31 Wn.App. 41, 48, 639 P.2d 800 (1982), *rev. denied,* 97 Wn.2d 1010 (1982).

Cover argues that the State was required to present independent evidence that Cover and the victim had sex on the specific date of April 14, 2007, as that is the date Cover included in his confession. Br. of Appellant, p. 14. To support his argument, Cover cites to *State v. Marselle*, 43 Wn. 273, 86 P. 586 (1906). However, his reliance on this case is misplaced. *Marselle* involved a case in which the State had no independent evidence to corroborate the defendant's statement that any crime occurred. The victim testified and denied any sexual contact; the defendant had confessed to sexual contact. *Marselle* at 273. There, the Court properly found the confession was wrongfully admitted as there was no substantive evidence that corroborated his confession. *Id.* at 276. But our Courts have never held, and have specifically rejected the claim that the State must present independent evidence of every element of a crime prior to admission of a defendant's confession. *State v. Hummel*, 165 Wn.App. 749, 766, 165 Wn.App. 749 (2012).

The facts in Cover's trial below are entirely different than those in *Marselle, supra*. The victim in Cover's case testified that Cover had sexual intercourse with her when she was 15 years old or younger a

minimum of 10 to 20 times. RP 184-93. Though the victim did not testify to a specific incident involving April 14, 2007, the State did present independent evidence through the victim's testimony that Cover did commit this crime on well more than three occasions.

In *State v. Angulo,* 148 Wn.App. 642, 200 P.3d 752 (2009), the Court found the three cases Cover relies on in his brief "applied a stricter than necessary standard for establishing the corpus delicti." *Angulo,* 148 Wn.App. at 656.[3] There, the Court found that it is only necessary to show that a "criminal act" occurred as opposed to showing a specific element. *Id.* The Court went on to find that when a child rape victim describes an act of attempted intercourse, there is sufficient evidence to admit the defendant's statement that he succeeded in achieving penetration, even if the victim did not testify to that fact. *Id.*

Indeed, the traditional purposes of the evidentiary corpus delicti rule concern *whether* a crime was committed and not *which* particular crime was committed. *Id.* Cover's arguments on this subject show a misapprehension of the purpose of and the law surrounding the corpus delicti rule. The gravamen of a child rape is the sexual act with a minor. *Id.* The gravamen of the offense is not which date it occurred on. A

[3] The cases are *State v. Mathis*, 73 Wn.App. 341, 869 P.2d 106, *rev. denied*, 124 Wn.2d 1018, 881 P.2d 254 (1994), *State v. Biles*, 73 Wn.App. 281, 871 P.2d 159, *rev. denied*, 124 Wn.2d 1011, 879 P.2d 293 (1994), and *State v. C.D.W.*, 76 Wn.App. 761, 887 P.2d 911 (1995).

defendant's confession to sexually abusing a child is not admissible only if he and the victim both remember the same date the rape occurred on. The victim in Cover's trial testified that he raped her 10 to 20 times during this time period. Cover confessed to a time on April 7, 2008 that he committed one of these acts. The rule against admitting a confession without corroborating evidence was not violated here as the State presented sufficient corroboration through the victim's testimony that Cover committed this crime.

Further, this rule was designed to safeguard against convicting someone for a crime not committed based solely on his confession; it was not meant to be a method of distinguishing one crime from another. *Id.* at 657. As in *Angulo*, "[t]here was no danger of a false confession resulting in a conviction for a crime that had not occurred" in Cover's case. *Id.* The corpus delicti rule cannot be tied too closely to the elements of the charged offense as it would likely result in the exclusion of extremely relevant and probative evidence. The Court in *Angulo*, discussed the problems this would cause well in the following discussion:

> Changing the facts of this case a little will illustrate the problem. In a hypothetical first degree child rape prosecution, nine-year-old victim V provides testimony that is unclear about whether or not the defendant D actually penetrated her. D confessed to the police that he did so, and the jury heard the testimony about the confession. Given the uncertainty of the evidence, the court instructs the jury

> on the lesser included offense of attempted first degree child rape. If the jury acquitted on the rape count, but returned a verdict on the lesser crime of attempted rape, the defendant could challenge *post hoc* the admission of his confession on the basis that the verdict established there was no evidence of penetration and the confession should have been excluded. Conversely, if V described an act of penetration but D's confession denied doing so and described only an act of molestation, would the corpus delicti rule require exclusion of the confession since it went to an uncharged crime of molestation? The result of such an overly element-based rule is that prosecutors would have to charge the crime defendant confessed to, rather than actually committed, in order to admit the statement.

Angulo, 148 Wn.App. at 658.

The strict corpus delicti rule described by Cover in his brief is not the law of this state. The independent evidence presented by the State clearly showed Cover committed numerous acts of a Rape of a Child against this victim. His statement to police that one such act occurred on a specific date was not improperly admitted. The corpus delicti rule was not violated and Cover's claim fails.

Even if the trial court did err in admitting Cover's confession as to raping the victim on April 14, 2007, it was harmless error. Improper admission of evidence may be harmless if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). This Court will not reverse a conviction due to error in admitting evidence

if it does not result in prejudice to the defendant. *Id.* When the error is not of constitutional magnitude, like corpus delicti, this court applies the harmless error standard of determining "within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981).

The jury found the victim to be credible. The jury also heard testimony from an eye-witness to one of the rapes, and heard that Cover and the victim's guardians arranged for him to marry her in Mississippi, and keep her hidden in California while the charges were originally pending in Washington State, which was initially successful as the State had no choice but to dismiss the charges when it could not secure the victim for trial. There was overwhelming evidence of Cover's guilt, even without his confession as to raping the victim on April 14, 2007. Even if there was error in admitting Cover's confession, any such error was harmless. The trial court should be affirmed.

II. The State presented sufficient evidence to convict Cover of all three counts of Rape of a Child

Cover claims that insufficient evidence supports his convictions for three counts of Rape of a Child in the Third Degree. Cover specifically claims that because his confession was inadmissible due to the corpus delicti rule in his first argument, that there was insufficient evidence to

support his conviction of Count 3 – Rape of a Child – occurring on April 14, 2007. From Cover's brief, it is clear his argument on this issue is that the victim's testimony was too "generic" and did not describe the number of times, the dates and time of day during which they occurred, or any other details sufficient to prove Cover guilty. The State clearly submitted sufficient evidence of all Cover's crimes to the jury, which found they occurred beyond a reasonable doubt. Cover's claim of insufficiency fails.

In reviewing a claim of sufficiency of the evidence, this Court looks at all the evidence, and inferences that can reasonably be drawn therefrom, and reviews it in the light most favorable to the State. *State v. Joy*, 121 Wn.2d 333, 338-39, 851 P.2d 654 (1993); *State v. Green*, 94 Wn.2d 216, 220, 616 P.2d 628 (1980). In reviewing this evidence, this Court determines whether any rational trier of fact could have found all the elements were proven beyond a reasonable doubt. *Joy*, 121 Wn.2d at 338. Deference is given to the trier of fact who resolved conflicting testimony and evaluated the credibility of the witnesses and persuasiveness of the evidence. *State v. Carver*, 113 Wn.2d 591, 604, 781 P.2d 1308, 789 P.2d 306 (1989).

Cover claims the victim's testimony does not constitute sufficient evidence of a third count of Rape of a Child when the only specifics she testified to about a potential third incident was that she had sexual

intercourse with Cover at his house, at Ms. Barnett's house, this would occur in the morning usually, Cover would pick her up, telling her grandparents he needed her to babysit, and that vaginal intercourse occurred between ten and twenty times in total. Br. of Appellant, p. 21. The jury found the victim credible based on its verdicts. Her lack of testimony regarding a specific date, specific time of day, or specific location that separate incidents occurred on does not result in insufficiency of the evidence.

In *State v. Ferguson*, 100 Wn.2d 131, 667 P.2d 68 (1983), the Supreme Court stated that "[t]o require [the victim] to pinpoint the exact dates of the oft-repeated incidents of sexual contact would be contrary to reason." *Ferguson*, 100 Wn.2d at 139. Along these lines, when victims testify to long-term abuse, describing incidents happening many times, but detailing that roughly the same type of touching occurred at each time, can support multiple convictions for separate and distinct acts. *State v. Hayes,* 81 Wn.App. 425, 914 P.2d 788 (1996). There, the Court noted that "[t]o hold as a matter of law that generic testimony is always insufficient to sustain a conviction of a resident child molester risks unfairly immunizing from prosecution those offenders who subject young victims to multiple assaults." *Hayes* at 438. Instead, the *Hayes* Court considered whether the victim described the acts with sufficient specificity to allow the jury to

determine what offense was committed, whether the victim was able to describe the number of acts committed with certainty, and whether the victim was able to describe the general time period within which the acts occurred. *Id.* In the *Hayes* case, the victim had testified that the defendant had "put his private part in mine" at least "four times" and some "[t]wo or three times a week" during the charging period. *Id.* at 435. Applying the factors discussed above, the *Hayes* Court found that the victim's testimony, though generic, was sufficiently specific to support each of the four charged counts. *Id.* at 438-39. The victim's testimony that the defendant had "put his private part in mine," along with her description of the usual course of conduct satisfied the first prong; her testimony that this occurred four times and up to two or three times a week satisfied the second prong; and that she testified the incidents occurred within the charging period satisfied the third prong. *Id.*

The testimony of the victim in Cover's trial below is just as specific, if not more, than the victim in *Hayes* was. In the Information filed against Cover, the State alleged three separate and distinct occasions that Cover committed Rape of a Child in the Third Degree. CP 45-46. At trial below, the victim testified in detail about what occurred on two incidents, she then also described penis to vagina intercourse on eight to 18 additional occasions during the charging period. More than just

indicating that the same thing happened over and over, S.H.M. provided additional details about many incidents which could sustain the conviction for Count 3. S.H.M. indicated on one occasion, distinct from the occasions she described which supported Counts 1 and 2, Cover placed his penis inside S.H.M.'s mouth, and touched her genitalia with his mouth. RP 191-92. Cover told S.H.M. that this was called "69." RP 192. Contact between the mouth of one person and the sex organs of another is sufficient to establish sexual intercourse. 9A.44.010(1)(c). S.H.M. also indicated sexual intercourse would occur on occasions when Cover would come to her house and tell her grandparents he needed her to babysit his girlfriend's children, and then he would take her to Julie's house and have sexual intercourse with her there. RP 187. Cover told police that the last time he had sexual intercourse with S.H.M. was at Julie's house. RP 341-42. S.H.M.'s certainty that the many additional incidents occurred was unwavering. The evidence at trial also showed that Cover raped S.H.M. in three separate methods: vaginal, anal, oral. RP 412. Each separate act of intercourse can constitute a separate count of Rape of a Child. *See State v. Tili,* 139 Wn.2d 107, 119, 985 P.2d 365 (1999).

All of the factors set forth by the Court in *Hayes* were met in this case. S.H.M. described every act with enough specificity so that the jury was able to determine what offense was committed. *See Hayes,* 81

Wn.App. 438. From S.H.M.'s testimony, there is no doubt that she described many acts of sexual intercourse, and thus Rape of a Child. The victim was able to describe the general time period within which the acts occurred (all before her 16th birthday, but after she had turned 14), and was certain in her testimony that sexual intercourse occurred on at least 10 separate occasions. These factors, as set forth in *Hayes, supra*, are all met, and thus the evidence presented by the state for Count 3 was far from generic. All of Cover's convictions are supported by sufficient evidence. Cover's claim of insufficient evidence fails.

III. The trial court properly allowed admission of the victim's prior consistent statements.

Cover alleges the trial court erred in admitting prior consistent statements the victim had made because, as he alleges, the fabrication was not recent, but occurred at the inception of the case. The trial court properly admitted this evidence after Cover agreed the court had a valid legal basis to admit it. The trial court's admission of this evidence should be affirmed.

This Court reviews a trial court's admission of hearsay for abuse of discretion. *State v. Foxhoven*, 161 Wn.2d 168, 174, 163 P.3d 786 (2007). A trial court abuses its discretion when its ruling is manifestly unreasonable or based on untenable grounds. *Id.* On review, a court may

uphold admission of evidence on any proper basis. *State v. Stanton,* 68 Wn.App. 855, 864, 845 P.2d 1365 (1993).

Though Cover initially objected to admission of the victim's prior consistent statements, after the State proffered the statements under ER 613, Cover conceded this was a lawful basis for admission, and changed his argument to one of asking the court to exercise its discretion in whether to allow the State to admit these statements, and how many of the statements to allow. RP 265; 296-303. Thus Cover has failed to preserve this particular claim for appellate review. A defendant generally waives the right to appeal an error unless he or she raised an objection at trial. *State v. Kalebaugh*, 183 Wn.2d 578, 583, 355 P.3d 253 (2015). "We will not reverse the trial court's decision to admit evidence where the trial court rejected the specific ground upon which the defendant objected to the evidence and then, on appeal, the defendant argues for reversal based on an evidentiary rule not raised at trial." *State v. Powell,* 166 Wn.2d 73, 82, 206 P.3d 321 (2009). In fact, it is well-settled that a defendant cannot assign error to the admission of evidence on a different ground from his objection below. *State v. Koepke*, 47 Wn.App. 897, 911, 738 P.2d 295 (1987).

At the trial court below, Cover objected to the admission of the victim's prior statements pursuant to ER 801. Cover then conceded the

propriety of their admission under ER 613. Cover cannot now allege admission of these statements was improper when he proceeded to agree to the legality of their admission at trial. The invited error doctrine prohibits a party from setting up an error in the trial court and then complaining about it on appeal. *In re Pers. Restraint of Tortorelli,* 149 Wn.2d 82, 94, 66 P.3d 606 (2003). Cover cannot now complain the trial court failed to sustain an objection he essentially withdrew. By agreeing there was sufficient legal basis to admit the statements under ER 613, and abandoning his ER 801 objection, Cover allowed the trial court to continue on its course of reviewing the admission of the statements under ER 613, and not under ER 801, the rule which Cover now attempts to invoke to show error. In *State v. Korum,* 157 Wn.2d 614, 141P.3d 13 (2006), the Supreme Court invoked the invited error doctrine to deny review of a defendant's claim of improper admission of evidence after he had stipulated to its admissibility. *Korum*, 157 Wn.2d at 649. Cover's abandonment of his ER 801 objection and agreement that ER 613 provided a basis for admission is tantamount to an agreement as to the propriety of the admission of the evidence. Therefore, this Court should decline review of Cover's claim of improper admission of evidence.

However, even if this Court reaches the merits of Cover's claim, this Court should affirm the trial court as the evidence was properly

admitted. At trial, the victim testified that Cover raped her multiple times when she was under the age of 16. The victim originally told her aunt and law enforcement about these incidents. During cross-examination, Cover impeached the victim with a four-page letter that Cover purported to be written by the victim, but which she did not remember writing, recanting the allegations of rape. RP 224-28. Based on the admission of this evidence by Cover, the State was entitled to rehabilitate its witness and the trial court properly allowed admission of the victim's prior statements to her aunt and law enforcement.

When a witness has been impeached, evidence to rehabilitate that witness may be admitted. *See* ER 608(a)(2). At a minimum, the impeached witness is allowed to explain the circumstances involved in the impeachment. *State v. Mak*, 105 Wn.2d 692, 718 P.2d 407 (1986). However, more specifically, ER 613 allows for admission of an impeached witness's prior consistent statements in order to rehabilitate that witness's credibility. 5D Wash. Prac., Handbook Wash. Evid. §613:8 (2016-17 Ed). The State is properly allowed to rehabilitate a witness whose credibility has been attacked. *See State v. Temple*, 5 Wn.App. 1, 10, 485 P.2d 93 (1971). Specifically, Tegland states in his handbook on evidence:

> Once a witness's credibility has been attacked, prior consistent statements by the witness may be admissible to rehabilitate the witness's credibility. Theoretically, there is a distinction between using such statements for the limited purpose of rehabilitating a witness's credibility, for which no hearsay exception is necessary, and using such statements as substantive evidence, for which a hearsay exception is necessary.

5D Wash. Prac., Handbook Wash. Evid. §613:8 (2016-17 Ed). Once Cover impeached S.H.M. with the four-page letter recanting any sexual contact or intercourse with Cover prior to their marriage, the State was properly permitted to rehabilitate her credibility by showing her prior consistent statements. These statements were not admitted as substantive evidence, and were never argued as such by the State. The trial court had a proper basis upon which to admit these statements, and did so upon proper consideration of all the issues. The trial court did not abuse its discretion in admitting these statements and this admission should be affirmed.

IV. The prosecutor did not commit misconduct.

Cover alleges the prosecutor committed misconduct during closing argument by arguing he was involved in hiding the victim in California and taking her out of school, thus preventing her from graduating, by misstating the burden of proof, and by asking a witness a question which

presumed that Cover was in custody. Cover failed to preserve his claims of prosecutorial misconduct and has not shown that any of these instances of alleged misconduct are so flagrant and ill-intentioned that they denied him a fair trial. Cover's claim fails.

A defendant has a significant burden when arguing that prosecutorial misconduct requires reversal of his convictions. *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011). To prevail on a claim of prosecutorial misconduct, a defendant must establish that the prosecutor's complained of conduct was "both improper and prejudicial in the context of the entire record and the circumstances at trial." *State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008) (quoting *State v. Hughes*, 118 Wn. App. 713, 727, 77 P.3d 681 (2003) (citing *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997))). To prove prejudice, the defendant must show that there was a substantial likelihood that the misconduct affected the verdict. *Magers*, 164 Wn.2d 191 (quoting *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)). A defendant must object at the time of the alleged improper remarks or conduct. A defendant who fails to object waives the error unless the remark is "so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994).

In the context of closing arguments, a prosecuting attorney has "wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence." *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009) (citing *State v. Gregory,* 158 Wn.2d, 759, 860, 147 P.3d 1201 (2006)). The court should review a prosecutor's comments during closing in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003); *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998).

In arguing the law, a prosecutor is confined to correctly characterizing the law stated in the court's instructions. *State v. Burton*, 165 Wn. App. 866, 885, 269 P.3d 337 (2012) (citing *State v. Estill*, 80 Wn.2d 196, 199-200, 492 P.2d 1037 (1972)). It can be misconduct for a prosecutor to misstate the court's instruction on the law, to tell a jury to acquit you must find the State's witnesses are lying, or that they must have a reason not to convict, or to equate proof beyond a reasonable doubt to everyday decision-making. *Id* (citing to *State v. Davenport*, 100 Wn.2d 757, 675 P.2d 1213 (1984), *State v. Fleming*, 83 Wn. App. 209, 921 P.2d 1076 (1996), *State v. Anderson*, 153 Wn. App. 417, 220 P.3d 1273 (2009), and *State v. Warren*, 165 Wn.2d 17, 195 P.3d 940 (2008)). Contextual

consideration of the prosecutor's statements is important. *Burton*, 165 Wn. App. at 885.

Improper argument does not require reversal unless the error was prejudicial to the defendant. *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). The reviewing court must look at whether the irregularity could be cured by instructing the jury to disregard the remark. *Davenport*, 100 Wn.2d at 762-63.

In Cover's case, any potential misstatement by the prosecutor did not affect the jury verdict, and Cover was not denied a fair trial. Cover argues the prosecutor argued facts not in evidence, that Cover hid the victim away, forced her to live in California, and took her out of school. However, these statements by the prosecutor were fair and reasonable inferences from the evidence presented at trial. The State showed Cover was charged with raping the victim, that he was present with her family when they discussed getting her out of the state to prevent her from testifying in his trial, and that as a direct consequence of Cover's actions, the victim was unable to remain in school and did not graduate. The reasonable and fair inference from this evidence is that Cover caused these things to occur, and Cover and his perpetration of these egregious crimes against the victim directly caused her to be removed from her school, her home, and what she knew, to live in another state, so that his freedom

could be protected. The prosecutor did not commit misconduct by making this reasonable inference from the evidence.

In *State v. McKenzie,* 157 Wn.2d 44, 134 P.3d 221 (2006), the Supreme Court found no misconduct when the prosecutor made inferences about a defendant's intentions from evidence admitted at trial. There, the evidence produced showed the defendant had not arranged counseling for the victim, he had wanted to pursue mediation, and had considered finding help in Canada. *McKenzie*, 157 Wn.2d at 58. In arguing this evidence, the prosecutor said that it showed the defendant wanted to buy the victim's silence. *Id.* While the Supreme Court found this argument a weak inference from the evidence, it found that even if this was misconduct, it was not so prejudicial as to warrant a new trial, especially when the defendant did not object to the argument. *Id.* at 59.

The argument made by the State here was a more reasonable inference from the evidence than the argument made by the prosecutor in *McKenzie, supra*. There was direct evidence elicited at trial that Cover knew about and participated in the attempts to hide the victim and prevent her from testifying. Julie Barnett testified that Cover told her about moving S.H.M. around so she would not be caught since they wanted it to all go away. RP 150. Cover also said he was going to have to play his part to make sure S.H.M. was "taken care of." RP 150. The reasonable

inference from all the evidence presented at the trial is that Cover hid the victim, forced her to live in California, and this resulted in her being removed from school. The prosecutor did not commit misconduct by making this argument.

Cover also argues the prosecutor committed misconduct by misstating the burden of proof. During the State's rebuttal argument, the prosecutor responded to Cover's argument and contention that none of the State's allegations were true. The prosecutor argued that in order for the defense's theory to be true, that it didn't happen, the jury would have to believe there were two false confessions, the victim was lying now and 9 years ago, as was Ms. Barnett, and the victim's aunt masterminded this whole story. This argument is far from Cover's claim of telling the jury it must find the State's witnesses are lying in order to acquit. Br. of Appellant, p. 27.

In *State v. Russell*, 125 Wn.2d 24, 882 P.2d 747 (1994), the Court addressed a claim of prosecutorial misconduct for alleged burden shifting in closing argument. There, the Court held that a prosecutor can make a fair response to defense counsel's arguments during rebuttal. *Russell*, 125 Wn.2d at 87. The Court stated that a prosecutor generally is permitted to make arguments that were "invited or provoked by defense counsel and are in reply to his or her acts and statements." *Id.* at 86. Further, "[t]he

mere mention that defense evidence is lacking does not constitute prosecutorial misconduct or shift the burden of proof to the defense." *State v. Jackson*, 150 Wn.App. 877, 885, 209 P.3d 553 (2009).

In *Jackson, supra*, the Court found the State did not improperly shift the burden to the defense by commenting on the lack of evidence to support or corroborate a particular claim when the prosecutor mentioned no evidence corroborated a defense witness's testimony and argued the State's witnesses contradicted that witness's version of events. *Jackson*, 150 Wn.App. at 887. The *Jackson* Court also found no prejudice could be established as the jury instructions explained clearly that "the State 'has the burden of proving each element of the crime beyond a reasonable doubt' and the defendant 'has no burden to prove a reasonable doubt exists.'" *Id.* at 888 (citing to the record below). The same instruction was given in Cover's case. CP 137. As in *Jackson*, the prosecutor in Cover's case did not improperly shift the burden of proof, and no prejudice can be shown.

Cover also argues the prosecutor committed misconduct during cross-examination of Ms. Patton when she asked her if she had spoken to Cover since he had been in jail. Cover did not object to this question, nor did he request an instruction to disregard. Case law involving a jury seeing a defendant shackled, though even more extreme a situation than a witness

fleetingly referring to having talked to the defendant in jail, may be instructive in this Court's analysis of the present issue. The mere fact that a jury sees an inmate wearing shackles does not mandate reversal. *State v. Gosser*, 33 Wn.App. 428, 435, 656 P.2d 514 (1982); *State v. Early*, 70 Wn.App. 452, 853 P.2d 964 (1993). In *Gosser*, the trial court properly denied a defendant's motion for a mistrial even though several jurors saw him in shackles. *Gosser*, 33 Wn.App. at 435-36. In *State v. Sawyer*, 60 Wn.2d 83, 371 P.2d 932 (1962), the Court ruled that an instruction to the jury after they saw the defendant being handcuffed by a deputy cured the error and therefore the defendant's motion for a mistrial was properly denied. *Sawyer*, 60 Wn.App. at 85-86. Even in these cases, where the claimed error was far more serious than Cover's, a curative instruction to the jury obviated any potential error. Here, Cover failed to object and failed to request a curative instruction. When an error can be obviated by a jury instruction, that error is waived by failing to request such an instruction. *State v. Russell*, 33 Wn.App. 579, 588, 657 P.2d 338 (1983). Cover has thus waived this claim and this Court should affirm his convictions.

V. The jury instructions were proper and Cover waived any claim of error by failing to object.

Cover alleges for the first time on appeal that the jury instruction telling the jury that it was alleged that Cover committed the crime over a prolonged period of time against a victim under the age of 18 is unlawful as applied to his case as he was married to the victim prior to her 18th birthday. Cover contends the jury may have found the presence of this aggravating factor based on lawful conduct after they were married. Cover did not raise this issue at the trial court level, and did not object to the instruction given to the jury.

Under RAP 2.5(a), appellate courts generally will not review issues not raised at the trial court. *See. e.g., State v. Coe*, 109 Wn.2d 832, 842, 750 P.2d 208 (1988); *State v. Peterson*, 73 Wn.2d 303, 306, 438 P.2d 183 (1968). Further, CrR 6.15(c) requires that timely and well-stated objections be made to jury instructions "in order that the trial court may have the opportunity to correct any error." *Seattle v. Rainwater*, 86 Wn.2d 567, 571, 546 P.2d 450 (1976). However, some instructional errors that are of constitutional magnitude may be challenged for the first time on appeal under RAP 2.5(a). This exception is a narrow one. Cover must show that the asserted error was constitutional, that it was manifest, and it was not harmless beyond a reasonable doubt. *State v. Scott*, 110 Wn.2d 682, 687, 757 P.2d 492 (1988).

There was no testimony or evidence admitted at trial that Cover and the victim engaged in sexual intercourse or potential child abuse after they were married. The victim only described incidents of sexual intercourse that occurred during the charging period, which all occurred prior to the victim turning 16, and prior to her marriage to Cover. It is a factual impossibility for the jury to have based its finding of the aggravating factor on conduct that occurred after the allegations were reported to police as there was no evidence of additional "abuse" after April 2007. Thus, the jury could not have rested its answer on this aggravator on any conduct occurring after S.H.M. turned 16. The aggravating factor is valid.

If any error occurred, it was harmless. The jury found two aggravating factors. Cover does not assign error to the jury's finding as to egregious lack of remorse. The record below only needs to support one of these factors in order to affirm Cover's sentence. *State v. Cardenas*, 129 Wn.2d 1, 12, 914 P.2d 57 (1996) (holding a sentence will be affirmed if the court finds any exceptional factor is valid). As noted below, the trial court would have imposed the same sentence based on his egregious lack of remorse even without the ongoing pattern aggravator. Therefore, any instructional error regarding the ongoing pattern of abuse instruction is

harmless since the outcome would not be any different. *See State v. Mason*, 160 Wn.2d 910, 927, 162 P.3d 396 (2007).

VI. The trial court properly imposed an exceptional sentence.

Cover alleges the trial court erred in imposing an exceptional sentence because it improperly relied upon the jury's finding of egregious lack of remorse and because a sentence of fifteen years was excessive. The trial court's basis for giving the exceptional sentence was proper and the sentence was appropriate for the crimes Cover committed. Cover's sentence should be affirmed.

A trial court may impose an exceptional sentence outside the standard range if it has substantial and compelling reasons to do so. RCW 9.94A.120(2); *State v. Hale,* 146 Wn.App. 299, 308, 189 P.3d 829 (2008). RCW 9.94A.210(4) provides that a reviewing court may only reverse an exceptional sentence if it finds:

> (a) Either that the reasons supplied by the sentencing judge are not supported by the record which was before the judge or that those reasons do not justify a sentence outside the standard range for that offense; or (b) that the sentence imposed was clearly excessive or clearly too lenient.

RCW 9.94A.210(4).

Here, the trial court found substantial and compelling reasons existed, by way of the jury's special verdicts, to impose an exceptional

sentence. CP 241. The jury found the defendant committed these crimes as part of an ongoing pattern of sexual abuse, and that he demonstrated an egregious lack of remorse. Cover argues the trial court's reliance on the jury's egregious lack of remorse finding did not provide the court with a proper basis on which to impose an exceptional sentence. Cover, curiously, is not challenging the *jury's finding* as to this aggravator. He cites no case in his brief which holds that a trial court is not empowered to rely on an unchallenged jury finding on an aggravating factor in deciding that a departure from the standard range is warranted. The trial court, in relying on the jury's finding of egregious lack of remorse, did not err in departing from the standard range. It seems axiomatic that a trial court may justify the imposition of an exceptional on the jury's unchallenged finding of an aggravating circumstance that has been codified by the legislature. If reliance upon a jury's finding of egregious lack of remorse is not justifiable as a matter of law, it is curious no one has informed the legislature of this fact so that this aggravator can be excised from the statute.

Moreover, Cover *specifically agreed* at sentencing that an exceptional sentence in this case was justified as a matter of law. Trial counsel stated:

> Obviously punishment is appropriate and it's our contention that it's not even a question of whether the court should go above the standard range. We think the fact that the jury found the aggravating factors that the court has a basis and—and perhaps even an obligation to go above the standard range of—up to sixty months... We'd ask the court to consider exceeding the sixty months but by a smaller margin than as suggested either by the State or by the Department of Corrections.

RP 557-58.

Cover then asked the court to impose an exceptional sentence of 84 months. RP 559. By asking the court to depart upward from the standard range, and preserving his objection only as to the *length* of the sentence, Cover invited the error of which he now complains. The State hereby incorporates the legal standards regarding invited error noted above in response to Issue Three. Because Cover invited this error, this Court should affirm the trial court's decision to depart from the standard range and decide only whether the length of the sentence is clearly excessive.

Even if this Court finds the trial court's reliance on the egregious lack of remorse aggravator was improper, the trial court's sentence was still proper due to the finding that these crimes were part of an ongoing pattern of abuse. "A reviewing court can affirm an exceptional sentence even though not every aggravating factor supporting the exceptional sentence is valid." *State v. Weller*, 185 Wn.App. 913, 930, 344 P.3d 695 (2015), *rev. denied*, 183 Wn.2d 1010, 352 P.3d 188 (2015). If the

reviewing court is satisfied that the trial court would have imposed the same sentence based upon one or more aggravating factors that have been upheld, then it may uphold the exceptional sentence instead of remanding for resentencing. *State v. Jackson*, 150 Wn.2d 251, 276, 76 P.3d 217 (2003). "This rule is particularly appropriate when the trial court expressly states that the same exceptional sentence would be imposed based on any one of the aggravating factors standing alone." *Weller*, 185 Wn.App. at 730 (citing to *State v. Nysta*, 168 Wn.App. 30, 54, 275 P.3d 1162 (2012)).

At sentencing, the trial court expressly found the same exceptional sentence would be imposed even if one of the aggravating factors was reversed on appeal. CP 241. As such, this Court should affirm the exceptional sentence imposed by the trial court. *See Jackson,* 150 Wn.2d 251, 276, 76 P.3d 217 (2003).

Cover also alleges the sentence was clearly excessive. The length of an exceptional sentence is reviewed for abuse of discretion. *State v. Oxborrow,* 106 Wn.2d 525, 530, 723 P.2d 1123 (1986). This Court should consider whether the grounds relied on in determining the length of the sentence are tenable and whether the amount of incarceration imposed is such that "no reasonable person" would have imposed it. *State v. Harmon,* 50 Wn.App. 755, 762, 750 P.2d 664, *review denied,* 110 Wn.2d 1033 (1988). A sentence will only be found "clearly excessive," if the sentence

is "so long that, in light of the record, it shocks the conscience of the reviewing court...." *State v. Ross* 71 Wn.App. 556, 861 P.2d 473 (1993). Further, a reviewing court need not state any reasons in addition to those relied upon to justify the imposition of the exceptional sentence in order to justify the length of the sentence. *Id.* at 573.

The trial court had a sufficient basis to impose the 180 month sentence. Cover's lengthy abuse of the victim, his egregious lack of remorse, and his ruination of the victim's life in order to avoid the consequences of his criminal acts warranted the imposition of the punishment imposed. Cover's sentence does not shock the conscience, and was entirely reasonable. The sentence should be affirmed.

VII. Cover received effective assistance of counsel.

Cover argues his trial attorney was ineffective for failing to object to admission of his statements to police about the last time he raped the victim, failing to object to jury instructions, and failing to object to the State's question about the defendant being in jail. Cover's attorney was not ineffective as none of these issues warranted objection or resulted in prejudice to Cover. Cover's claim fails.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the right of a criminal defendant to effective assistance of counsel. *Strickland v.*

Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). In *Strickland*, the United States Supreme Court set forth the prevailing standard under the Sixth Amendment for reversal of criminal convictions based on ineffective assistance of counsel. *Id.* Under *Strickland*, ineffective assistance is a two-pronged inquiry:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction ... resulted from a breakdown in the adversary process that renders the result unreliable.

Thomas, 109 Wn.2d at 225-26 (quoting *Strickland*, 466 U.S. at 687); *see also State v. Cienfuegos*, 144 Wn.2d 222, 226, 25 P.3d 1011 (2011).

Under this standard, trial counsel's performance is deficient if it falls "below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. To prevail on an ineffective assistance claim, a defendant alleging ineffective assistance must overcome "a strong presumption that counsel's performance was reasonable." *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Accordingly, the defendant bears the burden of establishing deficient performance. *State v. McFarland*, 127 Wn.2d 322,

335, 899 P.2d 1251 (1995). A defense attorney's performance is not deficient if his conduct can be characterized as legitimate trial strategy or tactics. *Kyllo*, 166 Wn.2d at 863; *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). A defendant can rebut the presumption of reasonable performance of defense counsel by demonstrating that "there is no conceivable legitimate tactic explaining counsel's performance." *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *State v. Aho*, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999).

To satisfy the second prong of the *Strickland* test, the prejudice prong, the defendant must establish, within reasonable probability, that "but for counsel's deficient performance, the outcome of the proceedings would have been different." *Kyllo*, 166 Wn.2d at 862. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; *Thomas*, 109 Wn.2d at 266; *Garrett*, 124 Wn.2d at 519.

Also, in making a determination on whether defense counsel was ineffective, the reviewing court must attempt to eliminate the "distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from the counsel's perspective at the time." *Id.* at 689.

"Counsel's decisions regarding whether and when to object fall firmly within the category of strategic or tactical decisions." *Id.* (citing *State v. Madison*, 53 Wn.App. 754, 763, 770 P.2d 662 (1989)). The failure to object only establishes ineffective assistance of counsel in the most egregious of circumstances. *Id.* This Court presumes that the failure to object was the result of legitimate trial strategy or tactics, and the onus is on the defendant to rebut this presumption. *Id.* at 20 (citing *In re Davis*, 152 Wn.2d 647, 101 P.3d 1 (2004)).

As discussed above, Cover's claim regarding improper admission of his confession under the corpus delicti rule is meritless. His attorney was not expected to object to frivolous issues, and he was not ineffective for failing to do so. Not only was the confession properly admissible, as also discussed above, if it was erroneously admitted it was harmless. As it was harmless, its admission did not result in prejudice to Cover and thus Cover cannot sustain his claim of ineffective assistance of counsel.

Cover also alleges his attorney was deficient in failing to object to the special verdict instructions on the aggravator of ongoing pattern of abuse. As discussed above, this instruction was not given in error, and thus his attorney was not deficient in failing to object. Further, any potential deficiency in failing to object to this instruction did not prejudice Cover for the same reasons set forth above and incorporated herein. (Space

restrictions prohibit the State from repeating each argument in each section of this brief.)

Further, as Cover was found to have committed two aggravating factors, either gave the trial court the authority to impose the same exceptional sentence. Further, the trial court also would have imposed the same sentence even with only one aggravating factor found. Thus Cover cannot show his attorney's performance prejudiced him as he would have received the same sentence with or without his attorney's objection to the now-complained-of instruction.

Finally, Cover's claim that his attorney was ineffective by failing to object to misconduct is without merit. Because the prosecutor's arguments were not improper, defense counsel was not deficient for failing to object. *See State v. Larios-Lopez,* 156 Wn.App. 257, 262, 233 P.3d 899 (2010) (stating "Because we have already determined that the prosecutor's arguments were not improper, Larios-Lopez does not show that his counsel's performance was deficient in failing to object to them."). Further, in order to show his attorney was ineffective, Cover must show that his objections to the prosecutor's arguments would have been sustained. *See State v. Johnston*, 143 Wn.App. 1, 19, 177 P.3d 1127 (2007) (citing to *Davis*, 152 Wn.2d at 748). Because the arguments were

not erroneous, no objection to the remarks would have been sustained. Cover's claims of ineffective assistance of counsel fail.

VIII. Cumulative error did not deny Cover of a fair trial.

Cover argues cumulative error denied him a fair trial. As discussed in each of the preceding sections, Cover has not shown any error below, let alone cumulative error that together affected the outcome of his trial.

The defendant bears the burden of proving an accumulation of error of sufficient magnitude that retrial is necessary. *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 332, 868 P.2d 835 (1994). Where no prejudicial error is shown to have occurred, cumulative error cannot be said to have deprived the defendant of a fair trial. *State v. Stevens,* 58 Wn. App. 478, 498, 794 P.2d 38 (1990). The cumulative error doctrine does not provide relief where the errors are few and had little to no effect on the outcome of the trial. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). Cover fails to show error, or how each alleged error affected the outcome of his trial. Further, Cover has not shown how the combined error affected the outcome of his trial. Accordingly, Cover's cumulative error claim fails.

IX. This Court Should Decline to Consider Appellate Costs Prior to the State's Submission of a Cost Bill.

Cover argues under *State v. Sinclair*, 192 Wn.App. 280, 367 P.3d 612 (2016) that this Court should not impose any appellate costs if the State substantially prevails on this appeal as he is indigent. The State

respectfully requests this Court refrain from ruling on the cost issue until it is ripe.

Under RCW 10.73.160, an appellate court may provide for the recoupment of appellate costs from a convicted defendant. *State v. Blank*, 131 Wn.2d 230, 234, 930 P.2d 1213 (1997); *State v. Mahone*, 98 Wn.App. 342, 989 P.2d 583 (1999). The award of appellate costs to a prevailing party is within the discretion of the appellate court. *State v. Sinclair*, 192 Wn.App. 380, 386, 367 P.3d 612 (2016); *see* RAP 14.2; *State v. Nolan*, 141 Wn.2d 620, 8 P.3d 300 (2000). However, the appropriate time to challenge the imposition of appellate costs should be when and only if the State seeks to collect the costs. *See Blank*, 131 Wn.2d at 242; *State v. Smits*, 152 Wn.App. 514, 216 P.3d 1097 (2009) (citing *State v. Baldwin*, 63 Wn.App. 303, 310-11, 818 P.2d 1116 (1991)). The time to examine a defendant's ability to pay costs is when the government seeks to collect the obligation because the determination of whether the defendant either has or will have the ability to pay is clearly somewhat speculative. *Baldwin*, at 311; *see also State v. Crook*, 146 Wn. App. 24, 27, 189 P.3d 811 (2008). A defendant's indigent status at the time of sentencing does not bar an award of costs. *Id.* Likewise, the proper time for findings "is the point of collection and when sanctions are sought for nonpayment." *Blank*, 131 Wn.2d at 241–242. *See also State v. Wright*, 97 Wn. App. 382, 965

P.2d 411 (1999). The procedure created by Division I in *Sinclair, supra*, prematurely raises an issue that is not yet before the Court. Cover could argue at the point in time when and if the State substantially prevails and chooses to file a cost bill.

By enacting RCW 10.01.160 and RCW 10.73.160, the Legislature has expressed its intent that criminal defendants, including indigent ones, should contribute to the costs of their cases. RCW 10.01.160 was enacted in 1976 and 10.73.160 in 1995. They have been amended somewhat through the years, but despite concerns about adding to the financial burden of persons convicted of crimes, the Legislature has yet to show any sympathy.

The fact is that most criminal defendants are represented at public expense at trial and on appeal. Almost all of the defendants taxed for costs under RCW 10.73.160 are indigent. Subsection 3 specifically includes "recoupment of fees for court-appointed counsel." Obviously, all these defendants have been found indigent by the court. Under the defendant's argument, the Court should excuse any indigent defendant from payment of costs. This would, in effect, nullify RCW 10.73.160(3).

In *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015), the Court indicated that trial courts should carefully consider a defendant's financial circumstances, as required by RCW 10.01.160(3), before imposing

discretionary LFOs. But, as *Sinclair* points out, the Legislature did not include such a provision in RCW 10.73.160. Instead, it provided that a defendant could petition for the remission of costs on the grounds of "manifest hardship." *See* RCW 10.73.160(4).

In this case, the State has yet to "substantially prevail" and has not submitted a cost bill. The State respectfully requests this Court wait until the cost issue is ripe, if it ever becomes so, before ruling on this issue.

CONCLUSION

Cover's claims of error fail. His convictions and exceptional sentence should be affirmed.

DATED this 4th day of November, 2016.

Respectfully submitted:

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CLARK COUNTY PROSECUTOR

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